NO. 78-1399

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1978

CHICAGO-MIDWEST MEAT ASSOCIATION, a not-for-profit corporation,

Petitioner,

v.

CITY OF EVANSTON, a municipal corporation, et al.,

Respondents.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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I N D E X

Citations

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This response is filed on behalf of the VILLAGE OF RIVER FOREST (RIVER FOREST), one of the respondents.

River Forest Ordinances

Village of River Forest Code-1957
Chapter 14. Food and Food Establishments.

Sec. 14.2. General sanitary requirements for food establishments and restaurants.

Item 13. Refrigeration.

(a) All readily perishable food or drink shall be kept at or below fifty degrees Fahrenheit, except when being prepared or served. This shall include all custard-filled and cream-filled pastries, milk and milk products, egg products, meat (including canned hams marked "Perishable" or "Keep under Refrigeration"), fish, shellfish, gravy, poultry and salads containing meat, fish, potatoes, eggs or milk or milk products. Raw meats shall be stored at or below forty degrees Fahrenheit.

* * *

Item 14. Storage, transportation, display and serving of food and drink. All food and drink shall be so stored, transported, displayed and served as to be protected from dust, flies, vermin, depredation and pollution by rodents, unnecessary handling, droplet infection, overhead leakage and other contamination, and shall at no time be kept in an unclean, unhealthful or unsanitary condition. No animals or fowl shall be kept or allowed in any room in which food or drink is prepared or stored. All means necessary for the elimination of flies, roaches and rodents shall be used.

* * *

ARTICLE II. Wholesale Food Itinerant Vendors

Sec. 14.24. Definition.

The term "wholesale food itinerant vendor" is hereby defined to mean any person not operating a regularly established store for the merchandising of foods, that shall, by traveling from place to place upon the public ways, deal, sell, offer for sale or deliver at wholesale from any vehicle for purposes of resale any article of food, confection, condiment, or drink used or intended for human consumption, or any article which is an ingredient of any such food, confection, condiment or drink.

Sec. 14.26. License required.

No person shall act as a wholesale food itinerant vendor without first having obtained a license therefor. Applications for licenses under this article shall give the address of the itinerant vendor and such other information as may be required by the health commissioner. The health commissioner shall cause an investigation to be made of the vehicle used or to be used, for the purpose of determining its fitness and suitability from a sanitary standpoint.

Sec. 14.27. License fee.

The annual fee for a wholesale food itinerant vendor shall be fifteen dollars for each vehicle used in said business.

Sec. 14.28. Emblems for vehicles.

Every person licensed as a wholesale itinerant vendor shall obtain from the village clerk at the time he procures his license a metal plate or other suitable emblem for each vehicle used in the

business. Said plate or emblem shall have plainly stamped or marked thereon the words "River Forest Wholesale Food Itinerant Vendor."

Sec. 14.29. Inspection.

The health commissioner shall cause an inspection to be made periodically of all vehicles of wholesale food itinerant vendors, to determine whether said vehicles comply with all health, sanitation and safety requirements.

Statement of the Facts

Petitioner's Statement of Facts makes no reference to the RIVER FOREST ordinance. The ordinance licenses and provides for inspection of food delivery vehicles under Sections 14.1(a), 14.2, 14.12, and 14.25 through 14.29 of THE RIVER FOREST CODE OF 1957, as amended. These provisions provide that the health commissioner has the right to inspect vehicles delivering food to retail stores for resale in order to determine that all health, sanitation, and safety requirements are observed. The ordinance further provides that food shall be so stored as to be protected from dust, flies, vermin, depredation and pollution by rodents, unnecessary handling, droplet infection, overhead leakage

and other contamination. The fee for the license is $15 a year, and the penalty for violation is by fine only.

The ordinance has been on the books of RIVER FOREST for over 30 years, and until this suit was filed there never was any objection to the enforcement of the ordinance. Petitioner has been unable to show any damages incurred by members of the petitioner association by submitting to the vehicular inspections in River Forest. At the time this litigation was brought by the petitioner, and as of the present date, there have been no suits filed against members of the petitioner association by RIVER FOREST because of lack of compliance by the members with the ordinance.

There was no request by either party for evidentiary hearings on the Motion to Dismiss nor on petitioner's Motion for Preliminary Injunction. The Statement of Facts of the petitioner makes no reference to the facts contained in RIVER FOREST's

affidavit. RIVER FOREST submitted the affidavit of Dr. Charles J. Weigel, its health commissioner for many years, along with a list of the inspections carried out by RIVER FOREST. Dr. Weigel's affidavit is specific in that it states that to his knowledge no food delivery vehicles were inspected by the U. S. Department of Agriculture within the boundaries of River Forest. Dr. Weigel further states that it was requisite to make inspections of delivery vehicles to retail outlets within the Village of River Forest so as to be careful that the food was not spoiled or otherwise contaminated. It is important to note that no counter-affidavits were filed by petitioner in reply to RIVER FOREST's affidavit.

Reasons for Denying the Writ

I

THE DECISION OF THE U. S. COURT OF APPEALS DOES NOT CONFLICT WITH EXISTING LAW.

As the Seventh Circuit and the U. S. District Court so properly held, there is nothing in the

Federal Wholesome Meat Act of 1967 (21 U.S.C., Section 678) which prohibits the imposition of regulations or inspection requirements which are not in addition to or different than those imposed under the Act. The federal law does not provide for any inspection at the point of ultimate destination of the shipment as the District Court points out in its Order.

As has been said in the brief of EVANSTON and the other villages, Sections 674 and 678 of 21 U.S.C. squarely support the District Court's decision. Petitioner had argued that 21 U.S.C., Section 624 provides for preemption by the federal government and that Section 624 prohibited regulation in any way by local governments of the transportation of meat food products. As the EVANSTON brief states on page 10, Section 624 contains specific authorization for regulation under the laws of the "State or territory in which such establishment is located ..." The whole point is that RIVER FOREST may legally

inspect at the point of delivery and federal authorities do not and have not.

Under the Illinois Municipal Code, Division 11, Chapter 24, Sections 11-20-1 through 11-20-5, et seq., Ill. Rev. Stat., a municipality has the right to regulate delivery and sale of food. RIVER FOREST has been delegated the power to regulate the inspection of all food and to do all necessary acts and make all regulations ". . . which may be necessary or expedient for the promotion of health. . . ." (Ch. 24, Sec. 11-20-5.) It is further provided that the corporate authorities of RIVER FOREST may establish and regulate markets and market houses. (Ch. 24, Sec. 11-20-1.) With specific statutory authority and delegation of power, it is obvious that RIVER FOREST has the power and the right to enforce its ordinances against the members of the petitioner trade association.

It is submitted that RIVER FOREST is clearly within its rights in providing for inspection of the

delivery trucks as they arrive in River Forest. The inspections usually take place at retail stores and restaurants located in River Forest. River Forest is a suburb of Chicago, 10 miles west thereof, with population of about 13,500. If a meat delivery truck, while en route to River Forest, suffers a breakdown in its refrigeration equipment and the temperature rises so as to effect meat spoilage,only RIVER FOREST would be in a position to inspect this vehicle on a governmental level. There is no kind of federal inspection that would help in this type of situation. Petitioner readily admits that villages may impose regulations only if they are not in addition to or different than those provided for in the federal law. The statute says so and the lower court has said so. It is certainly obvious that RIVER FOREST's ordinances are valid and do not conflict with the federal regulations and law promulgated under the Wholesome Meat Act of 1967 or under any other federal law. As the U. S. District

Court has said, the ordinances would foster the purposes of the Act "to protect the health and welfare of consumers by eliminating unwholesome, adulterated or misbranded meat products."

The petitioner persists in arguing that Jones v. Rath Packing Co., 430 U.S. 519, 97 S.Ct. 1305, 51 L. Ed. 2d 604, and Rath Packing Co. v. Becker, C.A. 9th 1975, 530 F.2d 1295, have meaning and are controlling in the disposition of this litigation. It is submitted that those decisions relate to both County of Los Angeles and U. S. weight labeling regulations and have nothing to do with the facts at issue; therefore, those decisions have no application to the case at bar. As the U. S. Court of Appeals said in its opinion at page 11(a):

> "This case is clearly distinguishable from Jones v. Rath Packing Co., 430 U. S. 519, 97 S.Ct. 1305, 51 L.Ed. 2d 604. In Jones, the Supreme Court held that the challenged state law was preempted because it was 'different' from federal standards required by the Wholesome Meat Act, 430 U.S. at 531-32. Both the state law and the Act regulated the same thing, meat labeling.

> In contrast, in the case before us the federal law is silent on the subject of state regulation, the condition of delivery vehicles away from the premises of regulated establishments."

II

THE LOWER COURT WAS CORRECT IN TREATING MOTION TO DISMISS AS MOTION FOR SUMMARY JUDGMENT.

The Court granted the respondents' Motion to Dismiss and that Motion was treated as a motion for summary judgment as a result of the Court's examination of material submitted by the parties (Memorandum Opinion A-7). This procedure is provided for in the following Rule 12(b) of the Federal Rules of Civil Procedure:

> "If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56."

The petitioner was not hurt by not introducing counter-affidavits. As the U. S. Court of Appeals in its opinion said at page 6(a):

> "If we assume the existence of all the facts alleged by the association, its challenges to the local ordinances fail nonetheless. We have concluded that the supremacy and commerce clauses allow municipalities to enact and enforce ordinances providing for the inspection of meat delivery vehicles at locations other than the premises of establishments regulated by the Act." (Emphasis added.)

The petitioner's third reason for granting the Writ, namely that petitioner was prejudiced because it did not introduce counter evidence, has no merit. Even if evidence were introduced, as the U. S. Court of Appeals said, the result would have been the same because there was no preemption, no conflict with federal law, and the ordinances did not contravene the commerce clause of the United States Constitution.

CONCLUSION

For the above reasons, the Writ of Certiorari

should be denied.

Respectfully submitted,

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